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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1986

STATE OF IDAHO,

Respondent,

and

MEMBERSHIP OF HEYBURN STATE PARK LEASEHOLDERS ASSOCIATION

Intervenor/Respondent,

vs.

THE COEUR D'ALENE TRIBE OF INDIANS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Ninth Circuit was in error in its findings of fact and law that the cottage and floathome leasing to private parties did not violate the forfeiture-reversion conditions of the Heyburn Park Patent of 1911 (Exhibit VI) basing its decision on two erroneous findings of fact and one erroneous conclusion of law as follows:

a. That a general legal custom and usage prevailed in federal lands and parks permitting similar private cottage leasing.

b. That the statutes of the State of Idaho allowed and actually encouraged private cottage site leasing in Heyburn Park.

c. That the rules of constuction (of the Patent of 1911) against forfeitures in favor of grantees were applicable rather than the opposite rules of construction against grantees (in this case Idaho in the Patent of 1911) and in favor of tribes (in deeds of tribal land held in trust for the tribe by the United States.)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the Opinion of April 29, 1987, No. 84-4145, 814 F.2d 1288, 1987.

OPINION BELOW

The opinion of the United State Court of Appeals for the Ninth Circuit is reported at 814 F.2d 1288 (9th Cir., 1987). A copy is appended as Exhibit I. The Ninth Circuit's order denying the petition for rehearing is not reported. A copy of the order is appended as Exhibit II. The Memorandum Decision of the District Court for the District of Idaho, unreported, of November 8, 1979 is appended as Exhibit III.

JURISDICTION

Jurisdiction to issue the Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. §1254. The opinion to be reviewed was issued on April 9, 1987. The Coeur d'Alene Tribe filed a timely petition for rehearing. The Order denying the petition for rehearing was issued May 28, 1987.

RELEVANT STATUTES

The Coeur d'Alene Allotment and Settlement Act of 1906, 34 Stat. 335, III Kappler 204, provides in relevant part:

> The the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, in the State of Idaho.
>
> That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall have been

surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child one hundred and six acres,...

That upon the completion of said allotments to said Indians the residue or surplus lands...of the said Coeur d'Alene Indian Reservation shall be classified under the direction of the Secretary of the Interior ...and shall be appraised under their appropriate classes...and, upon completion of the classification and appraisement, such surplus lands shall be opened to settlement and entry, under the provisions of the homestead laws,...

The full text of this statute is appended as Exhibit IV.

The Heyburn Act of 1908, 35 Stat. 70, 78, III Kappler 326, provides in relevant part:

That the land in the following subdivisions now embraced in the Coeur d'Alene Indian Reservation in Idaho, to-wit:...is reserved and withdrawn from allotment and settlement, and the Secretary of the Interior is hereby authorized to convey any part thereof to the State of Idaho to be maintained by said State as a public park, and conveyance to be made for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe. The proceeds of such sale shall be deposited in the Treasury of the United States for the use and benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.

The full text of the statute is appended as Exhibit V.

The presidential patent of June 29, 1911, provides in relevant part:

Whereas, the Act of Congress April 30, 1908—35 Stat. 70, 78—, authorizes the conveyance to the state of Idaho of the following described subdivisions or any part thereof, formerly a part of the Coeur d'Alene Indian Reservation in Idaho,...to be maintained by said state as a public park, for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe; and

Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17, and said Secretary has directed that said lands be conveyed to the State, upon payment by it of said sum, upon the following terms and conditions, to-wit: the lands are to be by said state held, used, and maintained solely as a public park, and for no purpose inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion thereof, shall not be, or shall cease to be, so used and maintained by the state, or shall be alienated by said state; and in event of the violation by the State of any of the conditions or covenants herein contained, or its failure to carry out the same, then the United States may thereupon or at any time thereafter enter upon, and into the exclusive possession of, the said lands and the whole thereof, and of all improvements thereon, and have, hold, seize, and possess the same:...

The full text of the patent is appended as Exhibit VI.

The Presidential order of November 8, 1873 establishing the Coeur d'Alene Reservation, provides as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz:

"Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning."

A copy of the Presidential Order is appended as Exhibit VII.

The Articles of Agreement of 1887 (ratified by Congress in 1891, 25 Stat. 1002) by which the Tribe ceded its aboriginal lands and the Congress affirmed and rational the establishment of the Coeur d'Alene Reservation, provides in relevant part:

ARTICLE 2: For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation...

ARTICLE 5: In consideration of the foregoing cession and agreements, it is agreed that the Coeur

> d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation...

The full text of this Agreement, as ratified by Congress, is appended as Exhibit VIII.

IDAHO CODE SECTIONS:

Idaho Code 39-3613, provides in relevant part:

> 39-3613. Continuation of cottage site lease program. — (1) The legislature of the state of Idaho recognizes that certain state lands are presently leased for cottage site uses and are subject to leases and contracts duly authorized by law. It is legislative intent to continue to recognize such leases. However, it is also legislative intent that no new or additional lands be platted, subdivided or leased for cottage site leases, unless and until the condition and precedents listed below have been met...(1975)

The full text of this Statute is appended as Exhibit IX.

Idaho Code 67-4202. Full text appended as Exhibit X.

Idaho Code 67-4204 provides:

> 67-4204. Heyburn Park — Granting of concessions. — The park and recreation board of the department of parks and recreation is authorized to make concessions to proper and desirable parties for the establishment of not to exceed three (3) places of refreshment and entertainment within the said park; also to make concessions to parties who will provide suitable boating

facilities upon the waters within said park under such restrictions as to use and compensation for use as said board may determine: provided, that no private parties ahll be permitted to construct wharves within said park.

The board shall also have full authority to determine the conditions upon which leases, concessions and privileges shall be granted, subject always to the condition that the park shall be free to public use and the enjoyment of all the people within discrimination as to race, under such rules and regulations as are to be provided as aforesaid. (1911)

The full text is appended as Exhibit XI.

Idaho Code 67-4218. Full text appended as Exhibit XII.

Idaho Code 67-4219. Full text appended as Exhibit XIII.

Idaho Code 67-4223 provides in relevant part:

67-4223. Powers of board. — The park and recreation board shall have the power to:...(g) Construct, lease or otherwise establish public park or recreational privileges, facilities and conveniences and to operate said recreational services and to make and collect reasonable charges for their use or to enter into contracts for their operation. The net proceeds derived shall be credited to the park and recreation fund created in section 67-225, Idaho Code, and are hereby specifically appropriated to defray the cost of the public park or recreational services. The department is specifically authorized to enter into contracts with the United States and its agencies which require that the state expend any excess of revenue above expenses for improvements of the recreational or park area from which the excess was derived....(1965)

The full text of this Statute is appended as Exhibit XIV.

Idaho Code 67-4224. Full text appended as Exhibit XV.

Idaho Code 67-4230. Full text appended as Exhibit XVI.

STATEMENT OF THE CASE

The Coeur d'Alene Indian Reservation in northern Idaho was established by Executive Order of President Grant in 1873 (Exhibit VII). This Executive Order was not ratified by Congress until 1891 when it ratified the Articles of Agreement of 1887 (Exhibit VIII) by which the United States in Article 5 agreed "that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation ...and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."

Despite this guarantee by the United States it, without any consent whatever of the Tribe or its members, enacted the Coeur d'Alene Allotment and Settlement Act of 1906 (Exhibit IV) which provided for the allotment of a portion of the Reservation to tribal members and opened the rest of the Reservation for homesteading. As a result of this Act more than 2/3 of the Reservation passed out of tribal and Indian ownership. Prior to the allotment and settlement there was congressional discussion of the possibility of opening a National Park in the area that is now known of as Heyburn Park in the northern end of the reservation. Failing that, there was enacted the Act of 1908 (Exhibit V) which authorized the Secretary to convey what is now known as Heyburn Park (approximately 6700 acres of land

on the north end of the reservation fronting on beautiful Lake Coeur d'Alene and its tributary Lake Chatcolet). As a result of this Act, President Taft through the Patent of 1911 (Exhibit VI) transferred all of Heyburn Park to the State of Idaho for the stated consideration of $11,379.17.

While it is contended by the state that there is evidence of tribal consent to this transfer the most that the record shows is that the tribal leaders had some knowledge of the plan for a national park and supported that idea. There is not a scintilla of evidence that the tribal leaders gave any consent to or in fact had any knowledge of the transfer of the land to the State of Idaho for a state park.

The Patent provided in relevant part:

> Whereas, the Act of Congress approved April 30, 1908 35 Stat., 70, 78—, authorizes the conveyance to the State of Idaho of the following described subdivisions or any part thereof, formerly a part of the Coeur d'Alene Indian Reservation in Idaho,...to be maintained by said state as a public park, for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe; and
>
> Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17, and said Secretary has directed that said lands be conveyed to the State, upon payment by it of said sum, upon the following terms and conditions, to-wit: the lands are to be by said State held, used, and maintained solely as a public park, and for no purposes inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion thereof, shall not be, or shall cease to be, so used and maintained by the State, or shall be alienated by said State; and in event

> of the violation by the State of any of the conditions or covenants herein contained, or its failure to carry out the same, then the United States may thereupon or at any time thereafter enter upon, and into the exclusive possession of, the said lands and the whole thereof, and of all improvements thereon, and have, hold, seize, and possess the same:. . .

All parties and courts have agreed that the patent language creates a fee simple subject to a condition subsequent giving rise, upon violations of the conditions of the patent, to a right of re-entry in which the title to the park would revert to the United States in trust for the Tribe.

As the Court points out, page 1290, Heyburn substantially encloses and fronts on Chatcolet Lake which is a part of beautiful Coeur d'Alene Lake and reputed to be the most beautiful part of the Lake and of the Reservation. In 1920 and thereafter Idaho began issuing a large number of permits to maintain float homes on the lake frontage, and picking out several acres of the choicest locations within the park, engaged in many (about 160) cottage site leases. The leases and permits were granted for periods of up to ten years and were regularly renewed and each entitled the lessee to "the exclusive right and privilege to possess and use (the site) in the manner and for the purpose hereinafter contained."

As the court on page 1291-1292 (Pet. App., p. 7-8) summarizes, the relevant procedural history is as follows:

> B. Procedural History
>
> Idaho filed suit in federal district court on December 30, 1976, seeking a declaratory judgment that its lease and permit practices did not violate the "public park" and anti-alienation conditions in the patent.

> In the alternative, Idaho sought a declaration either that its decision not to renew leases and permits constituted compliance with the Department of Interior's request so as to avoid forfeiture, or that granting one-year leases would comply with the patent. On September 7, 1977, the United States filed a complaint claiming the practices violate the conditions in the patent and seeking to quit title to the property. The suits were consolidated for trial and the court granted the Tribe and the Heyburn State Park Leaseholders Association (Leaseholders) leave to intervene.
>
> On November 9, 1979, the district court granted Idaho's motion for summary judgment, concluding on the basis of its findings of undisputed facts that Idaho had not violated the conditions in the patent. Both the United States and the Tribe appealed, but before oral argument the United States moved to voluntarily dismiss its appeal, and a panel of this court granted the motion....

As the Court of Appeals relates (page 1291 et seg. Pet. App. p. 7-8) this case has been before it three times with it having remanded it to the District Court on two occasions. The questions at issue in those remands were the standing or right of the Tribe to maintain the appeal with the United States having been dismissed and whether the Tribe could "exercise the power of termination." The District Court held against the Tribe on each occasion and the Court of Appeals reversed its holding both times. The matter and content of those appeals are not relevant to this Petition.

What is relevant to this Petition is the Appeals Court's final ruling on the Appeal of the Tribe from the Decision of the District Court of November 9, 1979 (Exhibit III) which held that the leasing by the State of cottage and floathome sites was not in violation of the 1911 patent (Exhibit VI)

and did not constitute sufficient reason to forfeit or terminate the rights of Idaho under the patent and cause a reversion of title, to the United States in trust for the Tribe.

The Court of Appeals affirmed the 1979 decision in its April 9, 1987 decision that is the subject of this Petition (Exhibit I). The Ninth Circuit in affirming the District Court's 1979 decision found, first, that the general rules of forfeiture prevailed. It stated that "Forfeiture provisions are not favored in the law." (p. 1292 Pet. App. p. 11) and are construed with "great strictness." It then found that there existed at the time of the initial leasing a general practice by the United States and State Governments allowing leasing of federal, state and park lands.

The Court then turned to Idaho practices and statutes as follows:

> ...The Idaho legislature has delegated the power to operate, maintain and develop state parks to the Idaho department of parks and recreation. Idaho Code §67-4219. Pursuant to this delegation of authority, the park and recreation board exercises vast powers in its administration of the Idaho state park system. Idaho Code §67-4223. The park and recreation board is vested with the authority to lease park land in all Idaho state parks, Idaho Code §67-4223(g) (1986 Supp.), and specifically in Heyburn State Park, Idaho Code §67-4204. This court must defer to the board's leasing policy unless the policy substantially infringes on an important federal right. Absent such deference the federal courts will become embroiled in the day-to-day operation of state parks....

Then, acting on the assumption that its understanding of the Idaho statutes was correct, it "deferred" to them and held that, under the circumstances of the case, "forfeiture is

not an appropriate remedy."

The court went further (page 1297, Pet. App. p. 22) and held that the long term leasing practices in the park did not violate the anti-alienation provision of the patent. It held that leasing did not constitute the prescribed alienation because "...the more commonly understood meaning of the word is that an alienation is a complete transfer of title rather than a transfer of a leasehold interest."

As the Tribe argues herein, the floathome and cottage site leasing constituted clear violations of the terms of the patent justifying forfeiture under the terms of the patent.

ARGUMENT

This petition seeks review of the Ninth Circuit decision which held that, despite what appeared to be clear violations of the Patent of 1911, forfeiture of title, in accordance with the terms of the patent, was not an appropriate remedy. The Court based this conclusion on two erroneous findings of fact and one erroneous conclusion of law as follows:

1. It found that there was a general custom and usage in federal lands and parks which allowed such cottage leasing.

2. It found that Idaho had clearly provided for such powers (of leasing cottage and floathome sites) in its applicable statutes.

3. It found that the canons of construction did not favor forfeitures and that the Tribe was not entitled to the benefit of the general rule of construction of patents of Indian land by which the 1911 patent should

have been construed in favor of the Tribe.

The Court was in error on each of these findings and its conclusion of law.

I. The Leasing of Cottage Sites Was and Still is the Exception Rather than the Rule in National Parks and Forests.

While the record includes instances of leasing of public lands in national forests and parks and in some instances in states and municipal parks, it lacks a single instance of the upholding of such leasing when title is held under the terms of a third party conveyance such as the Patent of 1911 (Exhibit VI). The Ninth Circuit cites a number of precedents (page 1295, Pet. App. p. 18-19). None of them is applicable or relevant. None involve restrictions and reversionary provisions such as found in the 1911 patent.

On the contrary, in almost every instance, the cited leasing was clearly legal. This was true as to Glacier Park where leasing was initially legal but was finally prohibited by federal statute in 1931. (16 U.S.C. 162(a)). The Court mentions Lassen Volcanic National Park (p. 1294, Pet. App. p. 16) but in that case a specific statute (16 U.S.C. 202) authorized limited leasing. The Court mentions Mackinac Island State Park (p. 1294, Pet. App. p. 16) as a precedent as having conditions similar to the 1911 patent and yet allowing cottage site leases. Prior to the patenting of the Mackinac Island Park to the state in 1895 there was express congressional authorization of cottage site leasing. The island park was filled with leased parcels and this practice was continued after transfer of title to the State.

The Appeals Court was in error in holding that private cottage site leasing was customary in National parks and

forest lands. The fact is that it was actually rare and, in no instance was it allowed where there were express limitations and rights of re-entry and reversion as expressed in the Heyburn 1911 patent.

II. Ninth Circuit Clearly Wrong in its Understanding of Applicable Idaho Codes as Including Power of Cottage Leasing.

1) On page 1295 (Pet. App. p. 18-19) the Court states:

> "The park and recreation board is vested with authority to lease park land in all Idaho state parks, Idaho Code 67-4223(g) (1986 Supplement) and specifically in Heyburn State Park, Idaho Code 67-4202. This court must defer to the board's leasing policy unless the policy substantially infringes on an important federal right.

In this fashion, the court leaps from a conclusion that the park and recreation board has the authority to lease park land to a finding that it has that policy to which the court should defer. The fact is that there is (and was) no such authority (to engage in cottage leasing) and that the policy was the opposite — no leasing.

The cited provision (4223(g)) (Exhibit XIV) was, before a non-relevant amendment to another part of the Act, Section (e) of the 1965 Act enacted long after the offensive leasing began. The only reference it makes to leasing is the following phrase:

> "The park and recreation board shall have power to: . . .(g) Construct, lease or otherwise establish public park or recreational privileges, facilities and conveniences and to operate said recreational services and to make and collect reasonable charges for their use or to enter into contracts for their operation."

Code section 4223 is the statutory grant of power to the Board. No place else in that section, except as quoted above, is there any reference to leasing. The write respectfully points out that it is "reaching real far" to interpret the foregoing quoted sentence as granting Idaho authority to enter into cottage leases. The most it grants is power to lease land and facilities for parks, not to lease park lands out to private individuals. Let us review the rest of the statute.

Section (a) authorizes it to "adopt, amend or rescind rules and regulations as may be necessary for the proper administration of the provisions of Section 67-4218, et seq., Idaho Code, etc" (all enacted in 1965). There are no rules or regulations promulgated by this board which would authorize cottage leasing. Nowhere in the cited statutes (67-4218, et seq.) is this authorization found. Instead is the broad authorization and mandate to acquire and operate parks for the maximum benefit of the public. 67-4219: ..."put into execution long range, comprehensive plan and program for the acquisition, planning, protection, operation, maintenance, development and wise use of areas of scenic beauty, recreational utility,...to the end that the health, happiness, recreational opportunities, and wholesome enjoyment of life of the people may be further encouraged..." 4224 (Exhibit XIV): "...acquire in the name of the state ...by gift, devise, purchase, agreement or otherwise, such land, etc."

The policy of the State of Idaho was never to lease for private use to anyone. It has always been to so administer the parks that the maximum benefit is gained by the public as now enunciated in these recent statutes.

As the term "leasing" is used once or twice and, in the context of other Idaho statutes, its meaning has to be limited to various concessional facilities for public use and to leases by the State itself of public recreational and park facilities.

The court went further and cited Idaho Code 67-4204 (enacted in 1911) as evidencing the policy of the State to permit cottage site leasing. That code provision specifically refers to Heyburn Park as follows:

> "67-4204 (Exhibit XI). Heyburn Park — Granting of concessions. — The park and recreation board of the department of parks and recreation is authorized to make concessions to proper and desirable parties for the establishment of not to exceed three (3) places of refreshment and entertainment within the said park; also to make concessions to parties who will provide suitable boating facilities upon the waters within the said park under such restrictions as to use and compensation for use as said board may determine: provided, that no private parties shall be permitted to construct wharves within said park.
>
> The board also have full authority to determine the conditions upon which leases, concessions and privileges shall be granted, subject always to the condition that the park shall be free to public use and the enjoyment of all the people without discrimination as to race, under such rules and regulations as are to be provided as aforesaid."

The foregoing code provision, relating specifically to Heyburn Park, enacted in 1911, the year of the 1911 patent, is the sole statutory basis for any leasing in Heyburn Park.

It obviously limits the "leases, concessions and privileges" to "three places of refreshment and entertainment

within said park; also to make concessions to parties who will provide suitable boating facilities upon the waters within the said park under such restrictions as to use and compensation for use as said board may determine: provided, that no private parties shall be permitted to construct wharves within said park."

This statute, far from being a grant of authority for the leasing of cabin sites, even denies the park and recreation board the right to permit private parties "to construct wharves within said park." The record shows that this statute was enacted to show a statutory compliance by Idaho to the terms of the 1911 patent. It is the only stated statutory or regulatory "policy" of Idaho for the administration of lands within the park. The Ninth Circuit states (on page 1295, Pet. App. p. 19) that "This court must defer to the board's leasing policy unless the policy substantially infringes on an important federal right." The writer responds that the foregoing policy, restricting leasing and concessions, is in perfect conformity with the requirements of the 1911 patent. The statute was enacted to be in conformity and compliance. The court in so deferring should now enforce that policy which did not include the authority to engage in private cottage site leasing.

It is further pointed out that the floathome leases are in obvious violation of this statute being in effect "wharves" owned by private parties.

Concluding this part of its decision (page 1296, Pet. App. p. 20) the court stated:

> "In this case, we cannot conclude that the Idaho park and recreation board exceed its ample authority through its leasing practices."

As aforesaid, the Board has no such authority (ample or otherwise) expressed or implied in any statute or regulation. The fact is that the leasing of private cottages and floathomes was in violation of the State's only relevant statute governing Heyburn, Idaho Code 67-4204.

The finding by the Court that Idaho had statutory leasing authority was an essential part of its decision against forfeiture. Its misunderstanding of the Idaho law is emphatically and clearly stated on page 1295 (Pet. App. p. 19). The Court was absolutely wrong in its interpretation of Idaho law. For this reason alone this Court should grant review and reverse.

III. Court Clearly in Error in its Conclusion that the Rules of Construction Against Forfeitures Govern Rather than the Rules of Liberal Construction in Favor of the Tribe.

The court sets up an overwhelming rule of construction against forfeiture. As to the Tribe's contention that the Patent must be construed strictly against Idaho the court states in its footnote 5 (page 1293, Pet. App. p. 14) that the canon of construction favoring the Tribe "does not apply in this case; the patent here involves an agreement between the United States and Idaho, not between the Tribe and the United States (for any other party.)"

The Court is incorrect in saying that this is an "agreement between the United States and Idaho." It is a grant of land to Idaho pursuant to the Act of 1908. The land granted is key tribal land on the Coeur d'Alene Reservation the beneficial title to which was in the Tribe and the legal title in the United States as trustee of the Tribe. The only "agreement" with Idaho was its acceptance of the patent with its forfeiture language and its payment of the $11,379.17.

The dissent deals with this on page 1300 (Pet. App. p. 30) but in the context that "where relief other than forfeiture is sought, the general requirements that a term be construed strictly against the party seeking relief does not apply." Judge Reinhardt then cites the general rule "the federal land grants are to be construed favorably to the federal government"...and that..."ambiguities are to be resolved against the grantee."

This rule of construction is amplified when dealing with Indian trust land when the United States is held to the strict standards of a fiduciary.

We have here the combination of two powerful rules of construction:

1. The rule of strict construction when the dedication is by a third party (here the U.S.) rather than by the state itself. The rules of construction are entirely different when the dedication is by the third party (here the U.S.) in which case the words of the dedication (here "to be by said state held, used, and maintained solely as a public park, and for no purpose inconsistent therewith") are strictly construed against the grantee.

2. The presumptions and rules of construction that come into play when dealing as a trustee with Indian lands.

This point is pivotal.

The doctrine of strict construction applies when dealing with Indian lands. Here, as aforesaid, the U.S. held the title to the Heyburn lands in trust for the Coeur d'Alene Indian Tribe. The lands were a key part of the Coeur d'Alene Reservation. They were, by virtue of the Act of 1908, being deeded or granted to the State of Idaho "to be by said state held, used, and maintained solely as a public

park, and for no purpose inconsistent therewith." The majority brushes off the rule of strict construction that should prevail because, according to it, this is not an agreement between the U.S. and the Tribe but between the U.S. and Idaho. It is in fact an agreement between Idaho and the Tribe, acting through its trustee, the U.S.

In this combination of the 1908 Act and the 1911 patent, we must look to congressional intent. In determining that intent we are cautioned to follow the general rule that doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973), as quoting *Carpenter v. Shaw*, 280 U.S. 363, 367, 74 L.Ed. 478, 50 S.Ct. 121 (1930).

The Ninth Circuit clearly erred in its conclusion of law that deprived the Tribe from the benefit of the foregoing rules of construction. The 1911 Patent deeding this key tribal trust land to Idaho must be construed strictly against Idaho. The Ninth Circuit did the opposite, it construed it strictly against the Tribe.

CONCLUSION

The preceding argument clearly indicates that the Ninth Circuit was in error in its two pivotal findings of fact. They were its finding of general custom and usage of allowing private cottage leasing of national forest and park lands and its finding that Idaho's statutes allowed cottage leasing of its park lands. The opposite was true. There was and is no such federal precedent and there are no Idaho statutes giving Idaho the leasing powers which the Ninth Circuit found existed.

The Court was also clearly wrong in its legal finding or conclusion that the presumptions and canons of contruction against forfeitures in general applied rather than the rules which in this case require a strict interpretation of the 1911 patent against the Idaho state grantee and a liberal construction in favor of the Tribe.

The Tribe's petition herein for a Writ of Certiorari should therefore be granted.

DATED this _____ day of July, 1987.

Respectfully submitted,

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